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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1263

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), ET AL., *Petitioners*,

v.

UNITED AIRCRAFT CORPORATION, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

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PETITIONERS' REPLY MEMORANDUM

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1. Respondent's claim that our first question is "not presented" is utterly fallacious.[1] We treat separately with each subpart ((a)-(c)) of that question.

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[1] Respondent also asserts: "Under Connecticut law the trial court's findings, not its memorandum of decision, are the basis of appellate review" (Opp. 3). This is refuted by what the Supreme Court of Connecticut did in this very case, where it relied on and quoted the Referee's memorandum of decision to determine

(a) Respondent asserts that the "connection between the facts and Mr. Mooney's opinions and his method for arriving at his opinions were explained in his testimony and described in the findings of the trial court" (Opp. 19). But the cited findings, set forth in full in the margin, merely recite the facts Mooney relied on and do *not* explain any "connection" between them and his opinions.[2] Nor, despite our express chal-

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his reasoning in rejecting Mooney's opinion that there was a substantial number of involuntary absences after July 1 (A. 124a). See also Maltbie, *Connecticut Appellate Practice* (1957), § 152, p. 187. Thus, this technical point, like respondent's objections to the questions presented (Opp. 18-20), is not even technically correct. The largely irrelevant "Counter Statement of the Case" (Opp. 2-17) is of a piece: All are tactics calculated to divert attention from the central issue of the case—whether Mooney's testimony provided a legally sufficient basis for distinguishing between losses caused by violence at the plant and those lawfully caused by federally privileged conduct.

[2] "267. His opinions were based upon his entire personal experience and his personal knowledge of the situation, particularly the violence, and not upon assumptions contained in a hypothetical question.

268. In arriving at his opinion, Mr. Mooney took into consideration his estimates of the number of committed strikers at the Pratt & Whitney and Hamilton Standard plants who in his opinion were committed to staying out for the duration of the strike. At Pratt & Whitney, Mr. Mooney estimated that there were 2000 to 3000 committed strikers, but to be conservative used a figure of 3500, which he considered to be reasonably related to the 3488 Lodge 1746 members who voted to strike, the average number of union members paid strike benefits, and the number of strikers who registered to return to work at the end of the strike. At Hamilton Standard, Mr. Mooney estimated that there were 1500 committed strikers, which he considered to be reasonably related to the union membership, the 1493 Lodge 743 members who voted to strike, the average number of union members paid strike benefits, and the number of strikers who registered to return to work at the end of the strike."

lenge (Pet. 37), does respondent even now suggest any rational connection between the facts relied on and the conclusion reached.

(b) The question presented asserts that the witness' method "is unknown to and unaccepted in any scientific discipline" (Pet. 3). This proposition is uncontroverted by either respondent or the record. Respondent does state that Mooney was an "expert" (Opp. 18), but it does not say expert in *what*. Our point, of course, is that Mooney's expertise in industrial relations does not qualify him to give "expert testimony" (Pet. 3) as to how many or what percentage of absentees were motivated by one reason rather than another, without even talking to any absentees, see Pet. 10-11, 40.[3]

(c) Respondent says: "Mr. Mooney's opinions were not contradicted by any facts found by the trial court, and petitioners point to none." (Opp. 19) At p. 23 of the petition we "point to" and quote the trial court's finding (A. 105a) that no employees were involuntarily absent after July 1, a finding which contradicts Mooney's opinion, detailed in the first two columns of Tables 1-A, 2-A, 3-A and 4-A to the Petition, that involuntary absences continued to the end of the strike, to which we "point" at Pet. 22-25. Contrary to respondent's misinterpretation that the trial court "found the underlying facts insufficient to prove the causation of absence after" July 1 (Opp. 24), it actually found,

[3] As for the observation that "[t]here was no evidence or finding of bias because he was a former 'employer official' " (Opp. 18,), his former position is itself strong "evidence" of bias. The failure of the courts below to make a "finding", or even to take his bias into account, is but another of the errors of law they committed, Pet. 39-40 and authorities cited *id.*, in accepting his opinion.

on the basis of evidence [4], which Mooney and Northrup ignored or discounted, that all absences after July 1 were involuntary, because the after effects of violence had by then been dissipated. (A. 105a). Thus, the trial court rejected Mooney's evaluation of the impact of the fear dissipating events of June 11-17, n. 4, *supra*. That is the contradiction which respondent (like the court below) feels compelled to deny because it was obviously irrational for the trial court to have accepted Mooney's opinion with respect to pre-July 1 absences while rejecting his view that the after effects of violence disappeared after that date, since Mooney's pre-July 1 estimates *depended upon* his opinion that involuntary absenteeism continued to the end of the strike, and because he used the same "method" throughout (Pet. 9-10, 23-25).

Additionally, observing that the trial court "had before it the opinions of Dr. Northrup * * * "; the testimony of 208 employees and certain other facts and findings, respondent objects that its determination was not based "only" on Mooney's opinions (Opp. 18). But the trier made no independent analysis of the evidence in reaching his conclusion on the amount of absence up to July 1, much less state how any or all of it supported the result he reached; on the contrary, he rejected Northrup's sharply divergent figures and refused to draw any inference from the testimony of the 208 employees.[5] He explicitly explained the basis

[4] That evidence, set forth at A.105a, consisted of the events between June 11 and June 17: the state and federal court injunctions, "the cessation of film taking by the plaintiff of picket activity; the withdrawal of the state police" and "the widespread publicity * * * of the issuance of the injunctions" (*id.*).

[5] Respondent's reliance on that testimony is ironic, for, as we demonstrated (Pet. 20-22), it likewise *contradicts* Mooney's opinion. Respondent, like the court below, fails to respond to our demonstration of conflict.

of his finding (A. 105a): "I accept as reasonably probable the testimony of Mr. Mooney * * * *" as to the percentages of involuntary absence "from June 9 up to and including July 1."[6]

2. Respondent, at Opp. 22, selects the wrong quotation from *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287. This Court there emphasized that "it is of prime importance that no constitutional freedom," in that

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[6] Respondent's objection that the second question was not timely and properly raised below (Opp. 19-20) is likewise bootless; not only was the due process claim correctly raised, it was confronted and decided by the Supreme Court of Connecticut, albeit, we submit, erroneously.

In defendants' brief on the first appeal to the Supreme Court of Connecticut we said with respect to the first trier's acceptance of Dr. Northrup's opinion (see Pet. 26-27):

> "In the final analysis, Northrup's testimony was not 'evidence' at all, and the court's reliance on it as the *sole* basis for an astronomical award for 'strike losses' was worse than a mere error of law. It constitutes a denial to defendants of due process of law, in contravention of the State and Federal Constitutions. See, *e.g.*, *Schware* v. *Bar Examiners*, 353 U.S. 232, 246-247; *Thompson* v. *Louisville*, 362 U.S. 199; *Garner* v. *Louisiana*, 368 U.S. 147." (Brief for Defendants in No. 6646, p. 88).

When the State Supreme Court held on the first appeal that the trial court was free to accept opinion testimony like that offered by Northrup, it rejected that constitutional claim, which was reiterated in the "due process" rubric on brief in the second appeal. Respondent itself points to the opinion on the first appeal to show that the Connecticut Supreme Court correctly understood the rule of *Mine Workers* v. *Gibbs*, 383 U.S. 715, on which the first question is premised (Opp. 21, citing A. 68a, 81a, 82a). Thus, the court below treated as given in its second opinion what it had previously decided (see 102a, 120a, 122a). It is absurd to suggest that the court below was unaware of our reliance upon the Fourteenth Amendment when in its second opinion it stated and rejected our position that Mooney's testimony does *not* provide the court with "any degree of assurance necessary to support the judgment of a court of law." (A. 116a.)

case the constitutional right peacefully to picket, be defeated through a state court's "insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." (*Id.* at 293).[7]

Respondent ignores *Letter Carriers* v. *Austin,* 418 U.S. 264, 282, which applied this tenet to rights protected by federal labor law (Pet. 34-36). Also directly in point, and likewise ignored by respondent, is *Youngdahl* v. *Rainfair,* 355 U.S. 131 (Pet. 33), where the Court examined the evidence both to determine whether it was sufficient to justify an injunction against violence (see 355 U.S. at 138-139) and whether it "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners" (*id.* at 139).[8]

A review of the record in this case compels the conclusion that the losses for which the courts below allowed recovery were not established by any competent

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[7] So too, *American Radio Ass'n.* v. *Mobile Steamship Assn.,* 419 U.S. 215, 231-232 (1974), cuts against petitioner, for the portion exised from its quotation (Opp. 21-22) shows that where a claim is made that the evidence does not ground the state court's "factual determination," this Court makes an independent examination to determine whether the state court has drawn "rational inferences" from the evidence. See also *Time Inc.* v. *Firestone,* 47 L.Ed.2d 154, 167 (March 2, 1976): "There was *competent* evidence introduced to permit the jury to assess the amount of injury" (emphasis added).

[8] Mr. Justice Burton contrasted the *Meadowmoor* facts: "Nor can we say that a pattern of violence was established which would inevitably reappear in the event picketing were later resumed. • • • There is nothing in the record to indicate that an injunction against such conduct [violence] would be ineffective if picketing were resumed." (*Id.*)

or rationally probative evidence (much less by a preponderance of such evidence) to have been proximately caused by violent conduct, although in order not to penalize the federally protected right to strike "recovery may be had only for" losses proved to have been so caused (*Gibbs, supra,* at 732).[9]

3. The contention that our petition does not raise federal questions meriting review comes with exceedingly ill grace from this respondent, which represented, when this litigation was first here:

> "As for petitioners, the worst that can befall them is that they must continue to defend their strike misconduct in the state courts. If a judgment for damages is awarded against them, they can pursue their preemption contentions on appeal to the supreme court of the state and by petition for writ of certiorari before this Court. The potential injury to them in fact is far less than that to which the petitioner in *Richman* was exposed, for there this Court's affirmance of the lower court left standing an injunction issued by the state court." [10]

In the event, the injury to the unions has turned out to be far *greater* than any which could then have been expected, for the state courts have rendered an enor-

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[9] Since federal rights are at stake, this case is not "governed by Connecticut law" (Opp. 18, cf. *id.* 23-24). In any event, our quarrel is not with the rule of *Taylor* v. *Monroe,* 43 Conn. 36, 44, as quoted at Opp. 23, but with its application to Mooney, who did *not* "have any peculiar knowledge or experience, * * * which renders [his] opinions founded on such knowledge or experience any aid to the court * * * in determining the questions at issue." See p. 3 *supra* and Pet. 8-25, and 36-40.

[10] Brief for Respondent United Aircraft Corp. in Opposition, No. 533, Oct. Term 1964, p. 14.

mous judgment for respondent's strike losses, differentiating those which were tortiously caused from those caused by federally protected activity only by scuttling "the essential requirement * * * that mere speculation be not allowed to do duty for probative facts" *Galloway* v. *United States,* 319 U.S. 372, 395. Respondent is unsurprisingly impatient to collect that judgment without subjecting it to the scrutiny of that tribunal whose foremost function is the vindication of federal rights. But lest those rights be sacrificed on the altar of irrational "expert" inference, this case must "be allowed to run its course, including the ultimate reviewing power in this Court." *Clothing Workers* v. *Richman Bros.,* 348 U.S. at 521.

CONCLUSION

For the reasons stated herein and in the petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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